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Supreme Court of The United States

OCTOBER TERM, 1962

NO. 389

MRS. AGNES JUNE DILLARD,
Petitioner

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,
Defendant.

PETITION OF MRS. DILLARD FOR REHEARING

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Mrs. Agnes June Dillard and presents this her petition for rehearing in the above entitled cause and in support thereof respectfully shows:

This honorable court has very definitely overlooked the following material facts and controlling decisions in denying the petition for certiorari in this case, because they unquestionably require the grant of the writ of certiorari under Section 1 of the Fourteenth Amendment of the U. S. Constitution and the prior uniform decisions of this court pertaining thereto.

The record shows that in a suit for serious, painful, permanent, and disabling injuries petitioner secured a verdict and judgment on October 9, 1959, in the amount of $21,816.00 against a corporation listed in the Atlanta Telephone Directory and the Atlanta City Directory as

"Jackson Ready Mix Concrete Co., Inc.," 1000 Seaboard Ave., N. E., Atlanta, Ga. Its correct corporate name was "Jackson's Atlanta Ready Mix Concrete Company, Inc." The public record of its charter does not identify it in any way with said address.

Petitioner's suit was against said corporation and the driver of one of its cement-mixing trucks which was negligently driven through a red traffic stop light and then on the wrong side of the street and into the automobile occupied by the petitioner as an invited guest passenger.

Both defendants were duly served with the suit and process at 1000 Seaboard Ave., but neither appeared nor answered. The jury's verdict for Mrs. Dillard is based upon proof submitted by her showing the extent, severity, and permanency of her injuries. (Neither the said verdict nor the judgment based thereon has ever been set aside and both are therefore final and conclusive.) Petitioner was injured on May 28, 1959, by the defendants, and *the Georgia Statute of Limitations for this tort is two years.*

Following the entry of said verdict and judgment, the corporate defendant filed two traverses of service, an affidavit of illegality, and a motion to set aside the judgment, in all of which it designated itself as the Defendant in Fi. Fa. On May 31, 1960, the Sheriff of Fulton County, Georgia, levied upon the property of the corporate defendant to satisfy Mrs. Dillard's execution. The Sheriff made the following entry of his levy: *"The said property is levied upon as the property of Jackson's Atlanta Ready Mix Concrete Company, Inc. doing business under the assumed trade or business name of Jackson Ready Mix Concrete Co., Inc. at 1000 Seaboard Ave., N. E., Atlanta, Ga. as Defendant in fi. fa. issued from Fulton Superior Court against Jackson Ready Mix Concrete Co. Inc. et al in favor*

of Mrs. Agnes June Dillard as Plaintiff in fi. fa. Property pointed out by plaintiff's attorney."

The corporate defendant thereupon filed a *"Third-Party Claim"* to the property so levied upon, although there were still pending its two traverses, its affidavit of illegality, and its motion to set aside the judgment, in all of which it designated itself as the defendant in fi. fa. as aforesaid. After filing its "Third-Party Claim" it dismissed one of said traverses on June 20, 1960, with the following stipulation in writing: *"Jackson's Atlanta Ready Mix Concrete Company, after levy made, having filed third-party claim in the within matter, the above traverse (of the service of process upon it)* is hereby withdrawn and dismissed." Its other traverse and its affidavit of illegality and motion to set aside the judgment were never dismissed or withdrawn.

Thereafter the Defendant's claim case came on for trial before Fulton Superior Court and a jury. In addition to the foregoing stipulation and admissions in judicio of Jackson's Atlanta Ready Mix Concrete Company, Inc. that it was the Defendant in fi. fa., the evidence adduced on the trial included, among other things: 1. Claimant's stipulation that one of its employees, E. H. Lambert, had been served with the suit and process on July 27, 1959 at 1000 Seaboard Ave. (R. 47-8). The production in court and in evidence by Claimant (Jackson's Atlanta Ready Mix Concrete Company, Inc.) of the copy of the suit and process served upon its said employee, E. H. Lambert (R. 47-8 and 54). 3. Its stipulation that said copy of the suit and process was the very one served upon its said employee, E. H. Lambert (R. 47-8 and 54). 4. That its Co-defendant, Robert R. Stephens (the driver of the truck which injured petitioner), was on the payroll of Jackson's Atlanta Ready Mix Concrete Company, Inc. at the time of the collision (R. 43). 5 Admission of H. N. Jackson,

Jr., General Manager of the Defendant Corporation, that the truck which injured Mrs. Dillard was its property and that the cement-mixer thereon had been dismounted therefrom (R. 28).

Upon the completion of the evidence in the claim case of Jackson's Atlanta Ready Mix Concrete Company, Inc., Mrs. Dillard's counsel moved for a directed verdict in her behalf upon the ground that THE POSITIVE AND UNCONTRADICTED EVIDENCE AND THE SOLEMN ADMISSIONS IN JUDICIO OF SAID CLAIMANT CORPORATION SHOWED IT WAS THE SAME LEGAL ENTITY AND PARTY AS THE DEFENDANT IN FI. FA. (R. 4-5). Said motion was denied by the Court. The case was then submitted to the Jury, after argument of counsel and charge of the court, and the jury returned a verdict for Jackson's Atlanta Ready Mix Concrete Company, Inc. as Claimant (R. 5, 18).

Mrs. Dillard thereupon moved for a judgment in her behalf non obstante veredicto as provided by the law of Georgia in such cases (R. 19-30). This motion was denied and Mrs. Dillard appealed therefrom to the Court of Appeals of Georgia, which affirmed the trial court. (R. 4-12).

Mrs. Dillard filed a motion for rehearing as provided by the law of Georgia upon the ground that the decision of the Court of Appeals deprived her, a citizen of Georgia and of the United States, of her property in the amount of her verdict, judgment, and fi. fa., *wthout due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution,* in that the law of Georgia as applied to other persons in like circumstances and similar situations provides that a judgment against a person (natural or artificial) in his or its assumed or trade name is valid and bind-

ing, and that such a person is a party to the judgment, and is not entitled to file a claim to property levied upon to satisfy the judgment (R. 68). This motion was denied with a revision of the opinion but adherance to the judgment affirming the trial court.

Plaintiff thereupon filed a petition with the Supreme Court of Georgia for a writ of certiorari to review, correct, and reverse the erroneous and unconstitutional decision of the Court of Appeals of Georgia upon the same grounds urged in Plaintiff's motion for rehearing in the latter court (R. 104). It was denied (R. 105). Plantiff also filed in the Supreme Court of Georgia a Motion for Reconsideration of the denial of her petition for certiorari to the Court of Appeals, and it was likewise denied.

Plaintiff then filed her petition to the Supreme Court of the United States for the writ of certiorari to review, correct, and reverse the decision and judgment of the Court of Appeals of Georgia of March 15, 1962 as revised on March 29, 1962 and its denial of the latter date of Petitioner's Motion for Rehearing. The said petition to this court was denied on November 13, 1962, and Petitioner now files this Petition for Rehearing.

Unless this honorable court grants the writ of certiorari in this case and reverses the Arbitrary, Capricious, Illegal, Unjust, Unconscionable, and Unconstitutional decision of the Court of Appeals of Georgia of March 15, 1962 as revised on March 29th, Petitioner will be forever barred from receiving any compensation whatever from the Defendant for the serious, painful, disabling, and permanent injuries inflicted upon her by its employee, Robert R. Stephens, on May 28, 1959, while operating its truck in its business (inasmuch as the statute of limitations as to this tort is two years), despite the fact that it was served with

suit and process by leaving a copy with its agent or manager, E. H. Lambert, at its place of business at 1000 Seaboard Ave., Atlanta, Ga., and petitioner secured upon proper proof a verdict and judgment against it in its assumed or trade name of Jackson Ready Mix Concrete Co., Inc. in the amount of $21,816.00, which is valid, final, and conclusive under the uniform decisions of the Court of Appeals and Supreme Court of Georgia applied to other persons in like circumstances and similar situations. In this connection this court has very apparently overlooked the decisions of the Court of Appeals and Supreme Court of Georgia in *Becker vs. Truitt*, 39 Ga. App. 286, 146 S.E. 654; *Becker vs. Truitt*, 170 Ga. 757, 154 S.E. 262; *Executive Committee of the Baptist Convention of Georgia vs. Smith*, 44 Ga. App. 184, 161 S.E. 143; *Eslinger vs. Herndon*, 158 Ga. 823, 124 S.E. 160; and *Smith vs. Hartrampf*, 105 Ga. App. 40, 123 S.E. 2nd 417, holding THAT A JUDGMENT RENDERED AGAINST A PERSON (NATURAL OR ARTIFICIAL) IN HIS OR ITS ASSUMED OR TRADE NAME IS NOT VOID BUT IS VALID AND BINDING, AND THAT SUCH A PERSON IS A PARTY TO THE JUDGMENT AND IS NOT ENTITLED TO FILE A CLAIM TO THE PROPERTY LEVIED UPON TO SATISFY THE JUDGMENT AND EXECUTION BASED THEREON. None of said decisions has ever been modified or reversed.

This court has apparently overlooked the case of *Florida Yellow Pine Co. et al* vs. *Flint River Naval Stores*, 140 Ga. 321, 78 S.E. 900, in which the Supreme Court of Georgia held that a party to a suit will not be allowed to disprove an admission made in his or its pleadings, without withdrawing the same from the record, and the case of *Pinkham* vs. *Gibbs*, 108 Ga. 141, 33 S.E. 945, holding that admissions in a sworn pleading are binding upon the party

making them, although he may strike them from the pleading by amendment. *In this case the admissions by the defendant* in its motion to set aside the judgment and its affidavit of illegality that it was the defendant in fi. fa: *were never dismissed or withdrawn.*

This court very apparently overlooked the decision of the Supreme Court of Georgia in *Moody and Wife* vs. *Davis,* 10 Ga. 410-12 holding: "IT IS THE DUTY OF THE JUDGE TO ENFORCE THE LAWS OF THE STATE, MADE IN ACCORDANCE WITH THE STATE AND FEDERAL CONSTITUTIONS — THE WHOLE LAW, AS IT APPLIES, IN HIS JUDGMENT, TO THE CASES WHICH COME BEFORE HIM. HE HAS NO RIGHT AND NO POWER TO WITHHOLD THE APPLICATION OF ONE SINGLE PRINCIPLE OF LAW TO A SINGLE CASE OVER WHICH HE HAS JURISDICTION; HE HAS NO DISPENSATION JUSTIFYING OR EXCUSING AN OMISSION TO APPLY THE LAW." IN THIS CASE THE RECORD SHOWS WITHOUT CONTRADICTION THAT THE COURT OF APPEALS ARBIRARILY REFUSED TO ENFORCE OR TO APPLY THE LAW TO PETITIONER WHICH WAS UNIFORMLY APPLIED TO OTHER PERSONS IN LIKE CIRCUMSTANCES AND SIMILAR SITUATIONS BY THAT COURT AND THE SUPREME COURT OF GEORGIA IN THE PARTICULARS POINTED OUT IN PETITIONER'S PETITION FOR CERTIORARI AND REPLY BRIEF. THIS CERTAINLY CONSTITUTES A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF SECTION I OF THE FOURTEENTH AMENDMENT and THIS FEDERAL CONSTITUTIONAL GROUND WAS PROPERLY AND TIMELY RAISED BY MOTION FOR REHEARING IN THE

COURT OF APPEALS IMMEDIATELY UPON THE RENDITION OF ITS SAID UNJUST AND UNCONSTITUTIONAL DECISION.

As shown in the cases of *State of Missouri Ex Rel. Missouri Insurance Co.* vs. *Gehner, Inc.*, 281 U.S. 313, 50 S.Ct. 326; *Brinkerhoff-Faris Trust and Saving Co.*, 281 U.S. 673, 50 S.Ct. 451; and *Dan Rogers* vs. *Ala.*, 192 U.S. 226, 24 S.Ct. 257, Petitioner was not bound to anticipate that the Court of Appeals of Georgia would fail and refuse to follow its prior and well established decisions and those of the Supreme Court of Georgia (which were binding upon it) that a judgment against a person (natural or artificial) in his or its assumed trade name is valid and binding, and that such a person is a party to the judgment and is not entitled to file a claim to property levied upon to satisfy the judgment.

As pointed out by this Court in *State of Missouri, ex rel. Gaines* vs. *Canada, et al*, 305 U.S. 357(7), 59 S.Ct. 232, 356, *The equal protection of laws* is a pledge of the *protection of equal laws*. As also stated by this court in *Hill* vs. *State of Texas*, 316 U.S. 400, 62 S.Ct. 1159: "EQUAL PROTECTION OF THE LAW IS SOMETHING MORE THAN AN ABSTRACT RIGHT. IT IS A COMMAND WHICH THE STATE MUST RESPECT—THE BENEFIT OF WHICH EVERY PERSON MAY DEMAND."

As held by this court in *Norris* vs. *Ala.*, 294 U.S. 587, 55 S.Ct. 579, Where a federal right is specially claimed in a State court (which was timely done in the case at bar), the U. S. Supreme Court must inquire whether the right was denied, not merely in express terms, but also in substance and effect, and, if necessary, evidence must be examined. As held by this court in *Malinski et al* vs. *People of State of New York*, 324 U.S. 401, 65 S.Ct. 781: "Ju-

dicial review of the guaranty of due process imposes on the Federal Supreme Court an exercise of judgment upon the whole course of proceedings to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people." Section I of the Fourteenth Amendment of the U. S. Constitution expressly provides that no State shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law."

In construing the Fourteenth Amendment of the U. S. Constitution this court held in CHAMBERS ET AL VS. STATE OF FLORIDA, 309 U.S. 227, 60 S.Ct. 472: "***ALL PEOPLE MUST STAND ON AN EQUALITY BEFORE THE BAR OF JUSTICE IN EVERY AMERICAN COURT. **** UNDER OUR CONSTITUTIONAL SYSTEM, COURTS STAND AGAINST ANY WINDS THAT BLOW AS HAVENS OF REFUGE FOR THOSE WHO MIGHT OTHERWISE SUFFER BECAUSE THEY ARE HELPLESS, WEAK, OUTNUMBERED, OR BECAUSE THEY ARE NON-CONFORMING VICTIMS OF PREJUDICE AND PUBLIC EXCITEMENT. *** NO HIGHER DUTY, NO MORE SOLEMN RESPONSIBILITY, RESTS UPON THIS COURT, THAN THAT OF TRANSLATING INTO LIVING LAW AND MAINTAINING THIS CONSTITUTIONAL SHIELD DELIBERATELY PLANNED AND INSCRIBED FOR THE BENEFIT OF EVERY HUMAN BEING SUBJECT TO OUR CONSTITUTION — OF WHATEVER RACE, CREED OR PERSUASION."

This court has very apparently overlooked its decision in the case of *U. S.* vs. *Lee*, 106 U.S. 196, 1 S.Ct. 261. To paraphrase the language of that decision, IT CANNOT BE, THEN, THAT WHEN IN A SUIT BY ONE PARTY

AGAINST ANOTHER PARTY FOR COMPENSATION FOR INJURIES NEGLIGENTLY INFLICTED UPON THE FORMER BY THE LATTER, WHEN THE INJURED PARTY HAS ESTABLISHED HER RIGHT TO COMPENSATION ACCORDING TO ALL THE FORMS OF JUDICIAL PROCEDURE, AND BY THE VERDICT OF A JURY AND A JUDGMENT OF THE COURT AGAINST THE PARTY WHICH NEGLIGENTLY HURT HER AND IN THE NAME UNDER WHICH IT WAS DOING BUSINESS AND WAS DULY AND LEGALLY SERVED, THE INJURED PARTY CAN BE ARBITRARILY AND ILLEGALLY DEPRIVED OF THE COMPENSATION AWARDED TO HER BY THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT MEREY BECAUSE THE PARTY WHICH SERIOUSLY INJURED AND DAMAGED HER NEGLECTED TO FILE AN ANSWER TO THE SUIT AND PROCESS DULY AND LEGALLY SERVED UPON IT AND WHERE UPON RENDITION OF A VERDICT AND JUDGMENT AGAINST IT FOR THE INJURED PARTY, IT FILED TRAVERSES OF SERVICE, AND ILLEGALITY, AND MOTION TO SET ASIDE THE JUDGMENT, IN ALL OF WHICH IT ADMITTED IT WAS THE DEFENDANT IN FI. FA., BUT UPON LEVY OF THE FI. FA. UPON ITS PROPERTY TO SATISFY THE JUDGMENT, IT FILED A FALSE CLAIM AS A THIRD PARTY TO THE PROPERTY LEVIED UPON; THAT, THOUGH THE NATURE OF THE CONTROVERSY IS ONE PECULIARLY APPROPRIATE TO THE JUDICIAL FUNCTION OF THE COURT IN WHICH PETITIONER OBTAINED HER VERDICT AND JUDGMENT AFTER A FAIR AND LEGAL TRIAL. "IF SUCH BE THE LAW OF THIS COUNTRY, IT SANCTIONS A TYRANNY WHICH

HAS NO EXISTENCE IN THE MONARCHIES OF EUROPE, NOR IN ANY OTHER GOVERNMENT WHICH HAS A JUST CLAIM TO WELL-REGULATED LIBERTY AND THE PROTECTION OF PERSONAL RIGHTS."

IT WOULD APPEAR TO BE IMPOSSIBLE TO PRESENT A STRONGER CASE OF THE DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OR ONE WHERE THIS FEDERAL QUESTION WAS RAISED MORE TIMELY OR PROPERLY THAN THIS CASE. UNLESS THIS COURT GRANTS THE WRIT OF CERTIORARI AND REVERSES THE ARBITRARY AND CAPRICIOUS DECISION OF THE COURT OF APPEALS, PETITIONER WILL BE CONDEMNED TO SPEND THE REST OF HER LIFE IN PAIN AND MISERY WITHOUT ANY COMPENSATION WHATEVER FOR HER SERIOUS INJURIES, DESPITE THE FACT THAT SHE OBTAINED A VALID AND FINAL VERDICT AND JUDGMENT THEREFOR AGAINST THE DEFENDANT IN A COURT WHICH HAD JURISDICTION TO RENDER THE SAME. IF THE STATEMENT IN SECTION I OF THE FOURTEENTH AMENDMENT OF THE U. S. CONSTITUTION THAT NO STATE SHALL "DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION, THE EQUAL PROTECTION OF THE LAW," means anything, IT VERY MANIFESTLY DEMANDS THE GRANT OF THE WRIT OF CERTIORARI AND REVERSAL OF THE UNJUST, UNCONSCIONABLE, AND UNCONSTITUTIONAL DECISION OF THE COURT OF APPEALS WITHOUT ANY EVI-

DENCE TO SUPPORT IT AND CONTRARY TO THE POSITIVE, OVERWHELMING, AND UNCONTRADICTED EVIDENCE AND SOLEMN ADMISSIONS OF THE DEFENDANT AND THE CONTROLLING LAW.

The basis of petitioner's position is best stated in the words of the late Mr. Chief Justice Stone in his appraisal of the late Mr. Associate Justice Van Devanter, as follows: *"He was profoundly aware that the true source of the strength of the Court and the permanency of its influence is public confidence in the thoroughness, integrity, and disinterestedness with which it does its work.* In his mind this signified, and rightly so, the need of unremitting study by every judge of every record and application which comes to the Court for disposition, and the free and frank exchange of views with associates as preliminaries to decision unaffected by extrinsic influences or nonjudicial considerations." *If this rule is followed in the present case, this court will undoubtedly grant the writ of certiorari and reverse the arbitrary and capricious decision of the Court of Appeals of Georgia and thereby administer to petitioner "EQUAL JUSTICE UNDER LAW,"* in accordance with the motto of this Court inscribed upon the beautiful building in which it is located, and the clear and positive language of Section I of the Fourteenth Amendment.

Respectfully submitted,

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CHARLES W. BERGMAN,
Of Counsel

CERTIFICATE OF COUNSEL

I, G. Seals Aiken, counsel for the above named Mrs. Agnes June Dillard, Petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

This the 6 of December, 1962.

G. Seals Aiken

G. SEALS AIKEN,
Counsel for Petitioner

ACKNOWLEDGEMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing Petition for Rehearing.

This December_____, 1962.

_____

Counsel for Jackson's Atlanta Ready Mix Concrete Company, Inc., Defendant.